1999

Edward Dale Hardy, II v. Utah State Board of Pardons and Parole, Scott Carver, Warden Utah State Penitentiary, Linda Clarke, Warden, California Training Facility : Reply Brief

Utah Court of Appeals

James H Beadles; Assistant Attorney General; Attorney for Respondents/Appellees.
Craig S. Cook; Attorney for Petitioner/Appellant.

IN THE UTAH COURT OF APPEALS

EDWARD DALE HARDY, II,

Petitioner-Appellant,

vs.

UTAH STATE BOARD OF PARDONS AND PAROLE, SCOTT CARVER, Warden Utah State Penitentiary, LINDA CLARKE, Warden, California Training Facility,

Respondents-Appellees.

Case No. 990774-CA

REPLY BRIEF OF APPELLANT

Appeal from an Order of the Third Judicial District Court
Salt Lake County, State of Utah
Honorable Timothy R. Hanson

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Case No. 990774-CA
(Priority 3)

REPLY BRIEF OF APPELLANT

When a backhoe accidentally cuts a telephone cable hundreds of private telephone, fax, and internet lines of communication are suddenly dead. When the cable crew arrives to repair the damage it must match the proper ends of each part of the cable in order to maintain the integrity of the various systems. If an incorrect match occurs the customer immediately knows of this failure by the fact that his or her line will not function or functions improperly. Thus, no matter how complicated the break may have been, in a

relatively short period of time the system will be functioning again since it allows no mistakes to be made when making the right connections.

Unfortunately, neither the lower court nor the appellate courts can work in such a smooth and self-repairing manner. Instead, faulty arguments can be advanced by a litigant and accepted by a court even though the correct connection has not been made. Later, on appeal, new lines of arguments can be intertwined with previous ones resulting in a maze of confusion, inaccuracy, and plain error but again there is no alarm which sounds when the wrong connections have been spliced together.

In the instant case, a single inmate is attempting to utilize the "great writ" of habeas corpus to challenge the sentencing decision of the Board of Pardons in 1986. Without counsel Mr. Hardy or any other inmate in the prison system would be hopelessly lost in the armada of legal tactics utilized by the state to contest a prisoner's claims. Even with highly experienced legal counsel the maneuvering through the state mine field is extraordinarily difficult. The various diversionary tactics used in this litigation as well as the confusion in the procedure below makes this appeal extremely difficult to articulate on behalf of Mr. Hardy.

The Brief filed by the Board of Pardons offers a shotgun approach to summarily affirming the lower court's decision and requires that this Court

make no independent analysis of the true record or what actually occurred during this complex procedural history. Petitioner Hardy sincerely regrets that this case cannot simply be argued on clear matters of law but instead must be minutely picked apart because of the many distortions made by the respondents in their attempt to make a very complex matter appear simple and of no merit whatsoever.

The Board of Pardons has on a number of occasions in its Brief carelessly made statements which are simply not supported by the record. Although some of these statements may be irrelevant to the issues of appeal, they show a pattern of misstatement which also permeate into those matters which are extremely relevant to this appeal.

A few examples will suffice. The State claims "Hardy also admitted to having committed three disciplinary violations while in the California prison system, including assault on another inmate." (Board of Pardon Brief at 3). Looking at the cited parole board transcript, however, Mr. Hardy specifically denied the disciplinary violation as to the assault of an inmate and claimed that he was only being investigated along with a number of others.

In another inaccuracy concerning the procedure of this case the respondents wrote:

> In an objection to the proposed order, Hardy's counsel claimed that he had never received the Minute Entry schedule and had not written down the hearing date. (Board of Pardons Brief at 7).

In fact, the Affidavit of Hardy's counsel, Craig S. Cook, stated, "Several days later I received a copy of the Minute Entry" and further noted that he had written a notation for the hearing date by merely writing "Hardy" rather than the time of the hearing. (¶¶ 2 and 6, Affidavit of Craig Cook, June 16, 1999).

Aside from inaccurate statements there are those which do not tell the whole story. For example, the State proclaims:

> On September 7, 1993, Hardy sent a letter to the Board requesting that it "please amend in light of the expungement, it's [sic] previous decision of September 24, 1986 regarding my release.". . . . A month later, Hardy challenged this decision in a letter to the Board in which he stated that he had not requested a "special attention review," but a "new and second hearing to nullify the old, and mistakenly conducted first hearing." (Board of Pardon Brief at 5).

The Board has conveniently left out the fact that Mr. Hardy in his September 7th letter specifically stated he did not want a redetermination review. He stated:

> With the foregoing in mind, I respectfully and humbly pray that, without being statutorily assessed for a redetermination under the provisions of the Utah Code, the honorable members of the Board of Pardons please amend, in light of the expungement, its previous decision of September 24, 1986 regarding my release. (R. at 74). (Emphasis added).

Thus, rather than stating that the Board specifically went against Mr. Hardy's request, it appears that he belatedly complained with no justification.

Likewise, the Board relies upon two letters which it claims put Hardy on notice that a parole hearing was upcoming. It then states: "Although Hardy states he never received the letter of September 17, 1986, which informed him of the September 24th hearing, that statement is self-serving at best." (Board of Pardon Brief at 9). The respondents, however, have failed to mention that in his Petition for Relief he filed the affidavits of his sister Linda Archie and his wife, Gloria Hardy who extensively verified this lack of notice claimed by Hardy. The lower court had to ignore the affidavits of his wife, his sister, and himself in order to make a factual conclusion that he in fact did have adequate notice based on the letter itself.

Finally, the Board has completely underplayed the settlement in the United States District Court concerning the disciplinary reports which are the subject of this litigation. (Board of Pardon Brief at 4). It must be kept in mind that in spite of the Board's repeated claims of escape by Mr. Hardy that (1) no criminal action was filed at the time Mr. Hardy left the Utah State Prison; (2) no disciplinary report of any kind was filed during his California incarceration; (3) after serving his California sentence the criminal charges of escape were dismissed by the Salt Lake County prosecutor for lack of

evidence; (4) the internal disciplinary reports in dispute were generated by inquiry by the Board of Pardons and not by the prison staff; (5) the initial charge of escape was thrown out by a prison administrative law judge because of timeliness and because Mr. Hardy did not have due process; (6) the warden reversed the administrative law judge, placed Mr. Hardy in solitary confinement, and submitted the report to the Board of Pardons which then exclusively relied upon it in the hearing; and (7) by settling this lawsuit and paying approximately $25,000 to Mr. Hardy and his attorney and by agreeing to transfer Mr. Hardy to California to be with his family, the state acknowledged the serious improprieties which occurred concerning these disciplinary reports.

With this tone of misstatements and incomplete statements in mind, Petitioner will now examine specific arguments made by the State in its Brief.

ARGUMENT

I.

THE LOWER COURT WAS REQUIRED TO HOLD AN EVIDENTIARY HEARING SINCE THE FACTS CONTAINED IN THE VARIOUS PLEADINGS WERE HIGHLY CONTRADICTORY AND REQUIRED FACTUAL RESOLUTION.

The Board contends that the documents filed by the parties allowed this matter to be decided as a matter of law without an evidentiary hearing.

(Board of Pardons Brief at pp. 8-10). The only documents which contain any "exhibits" as argued by the Board was Hardy's Petition for Extraordinary Relief and the "Memorandum in Opposition to Petition for Extraordinary Relief" filed by the Board with no accompanying motion for relief. The Board attempts to make its factual arguments to this Court rather than allowing both parties to properly present them in an evidentiary hearing below.

Rule 12(b)(6) does not permit resolution of disputes when clear factual conflicts exist in the record. As to the notice issue, for example, Hardy maintained that the Board of Pardons rules existing at the time allowed him sufficient notice to prepare for his hearing and to call witnesses on his behalf. Rule No. FD01/07.03(f) specifically stated, "Information shall not be sent to the Board of Pardons unless the inmate has had an opportunity for due process."

Hardy maintained that he and his family were never given proper notice of the hearing and that the letter which he supposedly received prior to the hearing was not generated until after the hearing was over. In support of this contention he filed his own affidavit, the affidavits of his sister and his wife as attachments to his original writ. *See* Affidavits contained in the Addendum herein. There is nothing to counter these affidavits in the materials supplied

by the Board except for the letter which Mr. Hardy contended was not timely sent. *See* Exhibit F to State's Memorandum.

As to the second factual issue concerning the use of the improper prison disciplinary reports and the exclusive reliance upon them by the Board, the record is entirely in Mr. Hardy's favor even if it assumed that this Court should decide this contested issue of fact on appeal as is argued by the Board. The Board's repeated factual claim that Mr. Hardy admitted to the escape is also contradicted by the Board record. A review of the transcript of proceedings contained in the Addendum of the Board's Brief shows that the Board relied entirely upon these reports. Mr. Webster in his opening statement said the following:

> Well, the information we have, and I have your disciplinary report here, that you were heard on, I understand, for some reason it was dismissed with—it was overruled and there is a conviction for the escape and we have the reports on the escape and I am repeating to you the report as we have them, and giving you an opportunity to . . . I notice in your application or on your Board report you do not acknowledge the escape took place but the fact remains that you left the institution and were gone for some 57 months or something to that effect. (Hearing 9-24-86, p. 1). (Emphasis added).

This statement illustrates that Webster relied upon the subsequently expunged report and that Hardy denied he had escaped. It should also be noted that Mr. Hardy was not at the Utah State Prison for 57 months because

he was serving time in California with the permission of the Utah prison system.

In another portion of the discussion Webster clearly indicates that he did not rely upon any other portion of Hardy's prison record. He states:

> I haven't had a chance to go through your prison record, I did take a look at and asked the institution to provide the Board with the documents regarding the disciplinary finding on the escape. I did that because of your comments not acknowledging it. (Hearing at 6). (Emphasis added).

Finally, a statement by Ms. Placeos clearly indicates that the report was all the Board had. She stated, "Now, we have a report, a rather detailed report that tells us about all the things you did. That's the only information we have. If you would have us believe that Scotty beamed you outside those walls, that's fine. But if you would prepare, to present to us an explanation of how you got outside the walls, I'll be happy to hear it. Otherwise all I have is the report that I've got. *Id.* at 9. (Emphasis added).

The Board in its "Memorandum in Opposition too Petition" included as exhibits various documents including newspaper accounts of Mr. Hardy's departure from the prison as well as other extraneous documents from California. The Certificate of Authenticity, included in the Memorandum, which supposedly validated all of these documents as being part of the Board of Pardons file was for an inmate named "Edwin Hardy, No. 21254". There

is no record of Mr. Hardy ever going by the name "Edwin" and his prison number is 14736. Thus, the State's own documents lack any legal foundation for a court to make findings of fact. Moreover, no attempt was made by the Board to show that the purported documents in the Board of Pardons' file were there on the date of hearing in 1986 rather than placed in it subsequently during these proceedings.

It is for this very reason that an evidentiary hearing is essential in these type of cases in order to probe and cross examine the contents of purported documents of importance. Hardy was never given the opportunity to cite the words of the Board members as has been done here or to challenge the authenticity of the documents supplied by the Board in its response.

The proper forum for these factual arguments is in the court below after a full evidentiary hearing. The Board has attempted to make this Court decide disputed matters of fact when they are not properly presented for appellate review.

II.

THE "SPECIAL ATTENTION" REVIEW ARGUED BY THE STATE IS NOT A PROPER ISSUE IN THIS APPEAL AND, IN ANY EVENT, DID NOT CURE THE TAINTED BOARD HEARING.

The July 26, 1999 Order from which this appeal is based does not rely upon the Special Attention hearing as a grounds for the decision. Apparently the Board is not comfortable with the actual reasoning of the lower court's decision and wishes to supplement it with arguments that were made but never relied upon in denying the writ. (Board of Pardons Brief at 11-14).

Assuming *arguendo* that this issue is properly raised, Petitioner Hardy has no problem in addressing it. The Board has once again distorted Hardy's request to amend the previous decision with the disciplinary reports being expunged. (Board of Pardons Brief at 11). Hardy specifically asked that a special attention hearing not be held. Thus, to say that he essentially requested the special attention review is a complete misstatement of the record.

Neither Hardy nor his family attended this proceeding. As to this type of hearing, Judge Davis in Peterson v. Utah Board of Pardons, 931 P.2d 147 (Utah App. 1997) stated the following:

> The Board's subsequent Special Attention Review consideration of the Felton evidence, out of Peterson's presence, does not remedy the due process violation committed here. As determined in Labrum an inmate must be provided a reasonable opportunity, with proper notice having been given, to "prepare responses and rebuttal of inaccuracies." 870 P.2d at 909. Because the Board's Special Attention Review does not require the presence of the inmate, that proceeding gave Peterson no opportunity to challenge inaccuracies, and thus did not remedy the initial due process violation. (*Id.* at 156) (dissenting opinion).

Second, an examination of the actual decision in the "Special Attention Review" contained in Exhibit I to the State's initial "Memorandum in Opposition to Petition for Extraordinary Relief" gives no explanation whatsoever for maintaining the same parole date. It is the State's mere speculation as to what occurred in that proceeding since there is no transcript or any record of the reasoning employed by the Board members.

Third, the State has argued that it is fair for the Board of Pardons to be aware of the expunged documents and yet rule impartially with this knowledge. Since the Board of Pardons is supposedly a neutral body and an independent fact-finder, Peterson v. Utah Board of Pardons, 931 P.2d 147 (Utah App. 1997) due process would require that any decision concerning Hardy's parole should be made by someone who does not know of the damaging disciplinary record of escape which was federally expunged. Because of the number of permanent members and availability of *pro tem* members it makes no sense to require a Board of Pardons member to both be informed of this expungement situation while at the same time being asked to make a fair and impartial decision.

Fourth, there is no evidence before the Court that the documents defendant wished to present to the Board in his original hearing were in fact

presented to the Board of Pardons at the Special Hearing. Again, without a factual inquiry it is mere conjecture as to what available information the special review hearing Board had before it. It is known, however, that Petitioner and his relatives were not allowed to speak at this hearing as they would have done at the original 1986 hearing had it been properly noticed.

Finally, the State's reliance upon the two Padilla cases is also misplaced. (Board of Pardons Brief at 12-13). Petitioner is not arguing that his personal appearance would be more persuasive but instead is asserting that had he been allowed to attend the hearing in 1986 with his family as provided by the rules of the Board of Pardons itself, he would have been able to present information relevant to setting a proper release date. In addition, had the expunged disciplinary reports not been available to the Board members, the focus of the hearing would have been Petitioner's initial crime and properly admitted evidence of his conduct in the prison system after his incarceration. Petitioner is merely asking for an impartial body to fairly evaluate him as he should have been evaluated in 1986.

III.

THE BOARD DISTORTS THE FUNCTION OF THIS APPEAL BY FOCUSING UPON THE CONDUCT OF THE BOARD OF PARDONS RATHER THAN THE DECISION OF THE LOWER COURT.

The Board once again attempts to distract this Court from the true issue of this appeal namely, did the lower court err in granting a Motion to Dismiss based upon a ruling of factual conflict without a hearing? The Board argues "evidence" even though an evidentiary hearing was never held. (Board of Pardons Brief at 14-15). Petitioner was never given an opportunity in this litigation to argue the evidence or to present his own evidence showing that the decision of the Board of Pardons was not based upon fundamental fairness even under its own rules at the time of the hearing.

The lower court factually found that Petitioner was given adequate notice of the September 14, 1986 hearing even though no effort was made to resolve the contrary affidavits filed by Petitioner's family. Likewise, the Court made a factual finding that such claim was untimely without making any determination as to the factual events giving rise to this conclusion. Finally, the court also concluded on its own speculation that the disciplinary reports made no difference to the Board and that extraneous information including his own admission made such reports irrelevant. Clearly, these factual assertions are not even supported by the Board of Pardons transcript itself and are clearly improper for a Rule 12(b)(6) motion.

IV.

PETITIONER IS ENTITLED TO PROCEED IN THIS MATTER BECAUSE OF CONSTITUTIONAL AND ADMINISTRATIVE DUE PROCESS VIOLATIONS.

Since Petitioner's counsel argued the Foote and Labrum cases before the Utah Supreme Court, he is extremely aware of the requirements in bringing cases against the Board of Pardons. Petitioner has relied upon pre-Foote and Labrum cases to assert his due process rights as well as the rules and regulations of the Board of Pardons existing at the time of his hearing.

The Labrum decision specifically discussed special cases in which an inmate could assert claims even though generally Labrum was held to be non-retroactive. The Utah Supreme Court stated, "A decision of non-retroactivity does not foreclose collateral suits by inmates who could show some evidence that the Board violated their rights to due process in their original parole grant hearings." 870 P.2d at 913.

CONCLUSION

Petitioner agrees that this matter should be orally argued and that this decision should be published in light of the numerous cases coming out of the prison system, the majority not being represented by counsel.

The Board continuously relies upon the maxim "if you can't convince them, confuse them." Petitioner is not asking this Court to reverse a decision

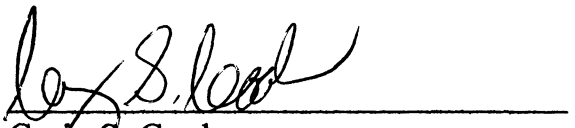
of the Board of Pardons. In fact, he is asking this Court to do nothing as to the Board of Pardons. The whole issue which is often lost by the Board's attempt to confuse is not what the Board of Pardons did or should do, but what the lower court didn't do—give Petitioner a chance for an evidentiary hearing.

Whether Petitioner prevails in his arguments is not material to this appeal. Instead, Petitioner believes that he has met the difficult burden of pleading his habeas corpus action and providing *prima facie* evidence of claimed deprivations which mandate an evidentiary hearing by an impartial fact-finder.

In closing, these type of cases are extremely important to hundreds of prisoners in Utah who are essentially sentenced by the Board of Pardons after they are given their indeterminate time period by the convicting judge. While no doubt a large majority of these cases can be thrown out as a matter of law by the overworked lower courts, a method must be established to sift those cases which deserve an evidentiary hearing on the merits in order that full constitutional and administrative protection be given.

For these reasons, therefore, the decision of the lower court should be reversed and this matter should be remanded for an evidentiary hearing.

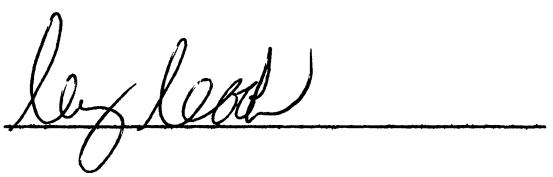
DATED this 30th day of May, 2000.



Craig S. Cook
Attorney for Petitioner-Appellant

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Reply Brief of Appellant to James H. Beadles, Assistant Attorney General , 160 East 300 South, #600, P. O. Box 140857, Salt Lake City, Utah 84114 this 30th day of May, 2000.



ADDENDUM

ADDENDUM INDEX

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IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

EDWARD DALE HARDY, II,

Petitioner,

vs.

UTAH STATE BOARD OF PARDONS,

Respondent.

AFFIDAVIT OF LINDA ARCHIE

Case No. _____

STATE OF CALIFORNIA)
: ss.
COUNTY OE Los Angeles)

1. I am the sister of Petitioner Edward Dale Hardy, II.

2. In September of 1986 I fully intended to attend my brother's Board of Parole hearing around September 10th. I had made travel arrangements to go to Salt Lake but was informed prior to the September date that my brother's wife had talked to a counselor and he had told her that the hearing had been postponed. I

was informed by his wife that a new hearing would be scheduled and that we would have plenty of time to plan our trip.

3. I was never given any notice by anyone that a new hearing was scheduled for September 24, 1986.

4. I did not learn about this hearing until after it had been held. I was very upset that I did not have the opportunity of attending.

5. I was prepared to speak about my brother's behavior both before and after his Vietnam war experience and to speak about his drug dependency at the time of the offense. My brother was not the same person during this period of time that I had always known and loved.

6. Had I been allowed to testify at the hearing I would have also corrected the misinformation that was in the Board's file concerning an armed robbery allegation. I had attended the entire trial which had resulted in a dismissal for my brother and his alleged co-defendant. It turned out that the victim had in fact robbed himself and blamed my brother and his friend when they drove into the gas station.

7. Had I been allowed to testify I would also have explained to the Board that my brother would have been welcomed back into the family trucking business which was owned by our father and which my brother was participating in until his Vietnam war service and subsequent loss of control of his life.

8. My family is very upset that we were denied the opportunity to support my brother at a hearing which determined the course of his life for the next 16 years. I hope that this past injustice will be rectified and that another hearing will be ordered that we can attend.

DATED this 11th day of August, 1997.

Linda Archie

SUBSCRIBED AND SWORN to before me this 11th day of August, 1997.

M. JEAN WOOD
Commission # 1080831
Notary Public — California
Los Angeles County
My Comm. Expires Dec 17, 1999

Notary Public
Residing at Lakewood, CA

My Commission Expires:

12-17-99

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IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

EDWARD DALE HARDY, II,

Petitioner,

vs.

UTAH STATE BOARD OF PARDONS,

Respondent.

AFFIDAVIT OF GLORIA HARDY

Case No. _____

STATE OF CALIFORNIA)
: ss.
COUNTY OF Shasta)

1. I am the wife of Edward Dale Hardy, II, and have been married to him since 1972.

2. During the summer of 1986 I was in constant contact with my husband concerning his scheduled Board of Pardons hearing. I was obtaining various documents he requested from me to bring to Salt Lake prior to the hearing. These

included documents concerning his California incarceration and his Vietnam war service and hospitalization.

3 I had made arrangements to travel to Utah during the first week of September along with his parents in order to help my husband prepare for the September 10th hearing. In the first part of September I called his counselor to ask for final instructions on how the hearing would proceed. At that time he told me that he believed the hearing was cancelled and not to come to Utah. He informed me that a new hearing would be scheduled in the future and that I would have ample notice in order to reschedule the travel plans of myself and his parents.

4. After the September 10th hearing had been cancelled I discussed with my husband the possibility of mailing him the various documents that I had obtained. I was in the process of copying them for mailing when my husband informed me that the hearing had already been held on September 24, 1986.

5. I was extremely shocked and upset that his family did not have the opportunity to attend this hearing. Besides myself and his parents and perhaps one of our children, there were other relatives scheduled to attend the hearing including his siblings.

6. Had I been given sufficient notice of the new scheduled hearing I would have made sure that the documents I had in my possession would have been transmitted to him either in person or by mail so that he could present them to the Board. In addition, I would have spoken about his mental condition after he

returned from Vietnam and the circumstances surrounding the crime for which he is incarcerated.

7. I would also have told the Board about my husband's change of behavior and attitude through the years that I had visited him in prison after his conviction and his total support for me and my children.

8. My family has been extremely upset over the fact that a hearing which placed my husband's life on hold for over 15 years was held without allowing us to be present and to participate.

DATED this 25th day of August, 1997.

Gloria Hardy

SUBSCRIBED AND SWORN to before me this 25th day of August, 1997.

L M DE BICHE'
Comm. # 1063760
NOTARY PUBLIC - CALIFORNIA
Shasta County
My Comm. Expires July 14, 1999

L. M. DeBiche
Notary Public
Residing at 2265 North St.
Anderson, CA 96007

My Commission Expires:

7-14-99

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of California

County of Monterey

On August 15, 1997 (Date) before me, Kara Schmidt, Notary Public (Name and Title of Officer (e.g., "Jane Doe, Notary Public"))

personally appeared Edward Dale Hardy II (Name(s) of Signer(s))

☐ personally known to me – OR – ☒ proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

KARA SCHMIDT
Commission # 1112076
Notary Public — California
Monterey County
My Comm. Expires Sep 23, 2000

WITNESS my hand and official seal.

Kara Schmidt
Signature of Notary Public

OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Description of Attached Document

Title or Type of Document: Affidavit

Document Date: August 15, 1997 Number of Pages: 6

Signer(s) Other Than Named Above: _____

Capacity(ies) Claimed by Signer(s)

Signer's Name: Edward Dale Hardy II	Signer's Name: _____
☒ Individual	☐ Individual
☐ Corporate Officer	☐ Corporate Officer
Title(s): _____	Title(s): _____
☐ Partner — ☐ Limited ☐ General	☐ Partner — ☐ Limited ☐ General
☐ Attorney-in-Fact	☐ Attorney-in-Fact
☐ Trustee	☐ Trustee
☐ Guardian or Conservator	☐ Guardian or Conservator
☐ Other: _____	☐ Other: _____
Signer Is Representing: _____	Signer Is Representing: _____
RIGHT THUMBPRINT OF SIGNER — Top of thumb here	RIGHT THUMBPRINT OF SIGNER — Top of thumb here

CRAIG S. COOK, Bar No. 713
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IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

EDWARD DALE HARDY, II,

Petitioner,

vs.

UTAH STATE BOARD OF PARDONS,

Respondent.

AFFIDAVIT OF EDWARD DALE HARDY, II

Case No. _____

STATE OF CALIFORNIA)
: ss.
COUNTY OF Monterey)

Petitioner Edward Dale Hardy, II, after being duly sworn deposes and states the following:

1. That I am the petitioner in the above-entitled case and am presently incarcerated in California and am serving a sentence imposed by the Utah courts and administered by the respondent Utah State Board of Pardons.

2. On August 4, 1986 I was given a notice that my initial parole grant hearing was scheduled before the Board of Pardons on September 9, 1986. I was also informed that under the rules existing at that time that two visitors would be allowed to speak on my behalf. I contacted my wife, parents, and sisters so that appropriate preparation could be made.

3. On August 21, 1986 I received an amended notice from the Board of Pardons changing the date of hearing to September 10, 1986. I informed my family of this changed date.

4. At the beginning of September, I was informally notified by a prison official that the hearing would probably not be held on schedule. On the date of September 10th an order was entered by the Board of Pardons continuing the matter "until the full-time three member Board can hear him." I was given no future date as to when the hearing would occur. My family had already been informed that the hearing was cancelled and therefore did not come to Salt Lake. I told them I would give them immediate notice whenever I learned of the new date.

5. On September 24, 1986 I was notified that a hearing would be held that day. I did not have any prior notice of this event and therefore could not notify my family in time for their appearance. I have seen a letter dated September 17, 1986 signed by Anthony King, Hearing Officer, stating that a new hearing would be held on September 24, 1986. I did not receive this letter until well after the September 24th hearing.

6. Because I was not given any prior notice of this hearing I was prevented from presenting to the Board various documents and sworn testimony that would have refuted and proven wrong much of the information and allegations that were adversely used against me by the Board during my prior 1980 hearing and my 1986 hearing.

7. My family members and I were gathering various documents that I could use in my defense. Because of the lack of notice I did not have these documents available to present to the Board.

8. The documents that I would have had if I had been given proper notice and opportunity to retrieve these documents are as follows:

(a) A California Department of Justice "rap-sheet" showing that an October 18, 1975 robbery was in fact "dismissed in the interest of justice" and was not a conviction as alleged and used by the Board during the parole hearing.

(b) FBI and Utah State "rap sheets" which show that I was never arrested or charged for a criminal homicide that the Board had alleged I had committed in 1979 and used adversely against me at the 1980 and 1986 parole hearings.

(c) A Salt Lake Tribune article of May 1979 quoting law enforcement sources and showing that another person did in fact commit

and was charged with the attempted criminal homicide that the Board alleged that I had committed.

(d) Four disciplinary reports and relevant case law and rules books which would have proven that the reports themselves were "minor disciplinaries" and by policy and regulation should never have been provided to the Board for adverse use against me at the 1986 hearing.

(e) A November 1985 chronological note containing statements from a correctional lieutenant and officer which refute damaging and misleading "confidential file information" that is contained in a Progress Report that was provided to the Board and used against me at the 1986 hearing.

(f) A VA hospital report that shows one day before I committed the offense for which I am imprisoned that I sought medical and psychological treatment because of severe depression. As a result of my visit this report would show that I was prescribed a mixture of medications which cause extreme emotional reactions.

9. I firmly believe that if I had been given timely and prior written notice of this parole hearing and had an opportunity to obtain necessary documents, I would have convinced the Board that two disciplinary reports that were created and provided at the Board's request for adverse use against me were erroneous and were compiled of untrue and unfounded hearsay that should never have been provided to the Board in the first place for adverse use against me.

10. Subsequently to the Board hearing, I filed a federal lawsuit involving these same allegations and the State of Utah signed a consent agreement that these documents would be expunged from my files and would not be used against me.

11. Other documents would have been presented to the Board to show that my mental capacity at the time of the crime was diminished—a fact which was never brought out in the court proceedings.

12. In addition, I believe that if two of my relatives had been allowed to speak they could have informed the Board as to my changed behavior after my Vietnam war experience and my mental condition during the time of the crime.

13. A review of the transcript of the parole hearing shows that none of these above matters were discussed and, in fact, most of the time was spent by the Board asking me about an alleged escape rather than upon the facts and circumstances of my crime and my conduct in prison since incarceration. The federal lawsuit subsequently filed resulted in all of the information brought out by the Board concerning this alleged escape to be improper and prejudicial and I am therefore asking for a new hearing with a new board where this subject will not be considered as part of the parole proceeding.

DATED this 15 day of August, 1997.

Edward Dale Hardy, II.

SUBSCRIBED AND SWORN to before me this 15th day of

August, 1997.

Kara Schmidt
Notary Public
Residing at Salinas, CA.

My Commission Expires:

September 23, 2000

KARA SCHMIDT
Commission # 1112076
Notary Public — California
Monterey County
My Comm. Expires Sep 23, 2000

CERTIFICATE OF AUTHENTICITY

I, Julie B. Safford, certify that I am the Records Technician for the Utah Board of Pardons and Parole of the State of Utah and that as the Records Technician I am the custodian of the Board's official records. I also certify that the attached documents are true and accurate copies of the original, official records contained in the Board of Pardons' file on Inmate EDWIN HARDY, prison inmate no. 21354. The original records are compiled and maintained by the Board in its ordinary course of business activity as required by law.

DATED this 22nd day of January, 1998.

Julie B. Safford
Records Technician
Utah Board of Pardons and Parole